Supreme Court, U.S.
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No. 96-806

# In the Supreme Court of the United States

OCTOBER TERM, 1996

RAAD QASGUARGIS

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

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## QUESTION PRESENTED

Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which divests the courts of jurisdiction to review deportation orders against aliens convicted of certain serious crimes, violates the Due Process Clause of the Fifth Amendment or the separation of powers doctrine.

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**BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 91 F.3d 788. The opinions of the Board of Immigration Appeals (Pet. App. 6a-7a) and the immigration judge (Pet. App. 8a-12a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on June 17, 1996. A petition for rehearing was denied on August 21, 1996. Pet. App. 5a. The petition for a writ of certiorari was filed on November 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner, a native and citizen of Iraq, entered the United States as a lawful permanent resident on February 17, 1966. In 1981, he was convicted in Michigan state court of attempting to carry a concealed weapon and was sentenced to one year of probation. In 1987, he was convicted in Michigan state court for delivering a controlled substance, cocaine, and was sentenced to three to twenty years' imprisonment. Pet. App. 9a.

2. a. On June 23, 1993, the Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner, contending that petitioner's controlled substance conviction rendered him deportable under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i). Petitioner admitted the conviction and conceded deportability, but requested discretionary relief from deportation under Section 212(c) of the INA, 8 U.S.C. 1182(c). Pet. App. 9a-10a.

b. On November 2, 1994, the INS moved the immigration judge to reopen proceedings in order to lodge an additional charge of deportability against petitioner under Section 241(a)(2)(C) of the INA, 8 U.S.C. 1251(a)(2)(C), based on petitioner's 1981 firearms conviction. After the immigration judge granted the motion to reopen, petitioner admitted the factual allegations relating to his firearms conviction, but neither conceded nor disputed the additional charge of deportability. On the basis of petitioner's admission, counsels' representations, and an examination of the record of conviction, the immigration judge concluded that clear and unequivocal evidence supported the charge. Pet. App. 10a.

c. The immigration judge concluded that, because petitioner's firearms conviction was a ground of deportability for which there was no analogous ground of inadmissibility, petitioner was statutorily ineligible for discretionary relief under Section 212(c). Pet. App. 11a-12a (citing *In re Hernandez-Casillas*, 20 I. & N. Dec. 262, 280 (Att'y Gen. 1991), aff'd, 983 F.2d 231 (5th Cir. 1993) (Table)). The immigration judge therefore ordered his deportation to Iraq. *Id.* at 12a.

d. On April 9, 1996, the Board of Immigration Appeals (BIA) affirmed the order of deportation. Pet. App. 6a-7a. It rejected petitioner's argument that he was not deportable under Section 241(a)(2)(C) based on his 1981 conviction for "attempted carrying of a concealed weapon." Although the BIA recognized that conviction of an attempt-based firearms offense did not constitute a ground for deportability under Section 241(a)(2)(C) until the enactment of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 203, 108 Stat. 4311, it concluded that the immigration judge had correctly applied the law as it existed at the time of the deportation hearing, and that the immigration judge had correctly determined under that law that petitioner was statutorily ineligible for Section 212(c) relief. Pet. App. 7a.

3. At the time of the BIA's decision, Section 106(a)(1)-(6) of the INA, 8 U.S.C. 1105a(a)(1)-(6), authorized review of final orders of deportation in the courts of appeals, and Section 106(a)(10) of the INA, 8 U.S.C. 1105a(a)(10), authorized the district courts to entertain petitions for writs of habeas corpus filed by aliens held in custody pursuant to orders of deportation.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 401(e) of the AEDPA repealed INA § 106(a)(10)'s special provision for habeas jurisdiction, 110 Stat. 1268, and Section 440(a) of the AEDPA amended Section 106(a)(10) to exclude from judicial review final orders of deportation entered against certain classes of criminal aliens, 110 Stat. 1276. As amended by the AEDPA, Section 106(a)(10) read in pertinent part as follows:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) * * * shall not be subject to review by any court.

110 Stat. 1276-1277.[1] Section 440(d) of the AEDPA, in turn, amended INA § 212(c) to eliminate the Attorney

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[1] On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (*reproduced at* 142 Cong. Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996)), which effected a sweeping overhaul of the INA. Section 306(b) of IIRAIRA repeals Section 106 of the INA, which heretofore has governed the review of deportation and exclusion orders (and which Section 440(a) of the AEDPA had amended), and Section 306(a) of IIRAIRA replaces it with a new Section 242, which precludes judicial review of deportation orders against aliens, like petitioner, who are deportable by reason of having committed drug-trafficking or firearms offenses. IIRAIRA § 306(a)(2) (*reproduced at* 142 Cong. Rec. H11,803-H11,804 (daily ed. Sept. 28, 1996)). Because petitioner's deportation order was entered in 1996, however, IIRAIRA's judicial review provisions do not apply to his case. See IIRAIRA § 309(a) and (c)(4) (*reproduced at* 142 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)), as amended by

General's authority to grant relief from deportation to any "alien who is deportable by reason of having committed any [such] criminal offense." 110 Stat. 1277. Petitioner, as noted, is deportable by reason of having committed criminal offenses covered in Section 241(a)(2)(B)(i) and (C) of the INA, 8 U.S.C. 1251(a)(2)(B)(i) and (C). See Pet. App. 3a.

4. On May 2, 1996, petitioner filed a petition for review of his final order of deportation in the United States Court of Appeals for the Sixth Circuit. Pet. App. 3a. On June 17, 1996, the court of appeals granted the government's motion to dismiss. *Id.* at 1a-4a (per curiam). The court concluded that Section 440(a) of the AEDPA barred the petition for review. *Id.* at 3a-4a (citing *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.")).[2]

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Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (changes effected by Title III-A of IIRAIRA generally become effective on April 1, 1997); see *INS* v. *Yang*, 117 S. Ct. 350, 352 n.1 (1996).

[2] The court rejected without discussion petitioner's argument that the Due Process Clause of the Fifth Amendment and the principle of separation of powers required judicial review of the BIA's determination that petitioner was statutorily ineligible for Section 212(c) relief.

## ARGUMENT

Petitioner no longer contests the court of appeals' holding that Section 440(a) of the AEDPA applies to cases, like this one, in which the convictions that form the bases for the order of deportation occurred before the AEDPA's enactment.[3] Rather, petitioner argues that the Court should grant certiorari in this case to resolve "once and for all" what he describes as the "difficult question of whether deporting lawful permanent [resident aliens] without independent judicial scrutiny violates the Due Process Clause of the Fifth Amendment and/or the separation of powers doctrine of Article III, § 1"—a question over which, petitioner contends, "the federal courts have divided." Pet. 5-6.

The court of appeals correctly rejected petitioner's argument that due process or the doctrine of separation of powers requires judicial review of his statu-

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[3] With the exception of the Seventh Circuit, which deviated in a limited respect, the other courts of appeals that have considered the issue have also concluded that Section 440(a) operated immediately upon its enactment to divest the courts of jurisdiction to review final orders of deportation. See *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Salazar-Haro* v. *INS*, 95 F.3d 309, 310-311 (3d Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir. 1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, No. 96-6076 (Jan. 6, 1997); see also *Sanchez-Rodriguez* v. *INS*, No. 96-9518 (10th Cir. July 12, 1996) (per curiam order dismissing petition for review for lack of jurisdiction); *Rolle* v. *INS*, No. 96-4560 (11th Cir. July 15, 1996) (same); but see *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492-493 (7th Cir. 1996) (Section 440(a) does not apply to an alien who had a nonfrivolous defense to a charge of deportability but conceded deportability and sought Section 212(c) relief before the enactment of the AEDPA).

tory claim, and (contrary to petitioner's suggestion) its decision does not conflict with any decision of this Court or of any other court of appeals. The court below had no occasion to address the broader issue whether Congress may bar all avenues of judicial review of all issues (including constitutional issues) that may arise in a deportation proceeding. Nor has that issue been decided by any other court of appeals.

1. Contrary to petitioner's argument (Pet. 5-6), there is no conflict among the courts of appeals "over the constitutional limits on Congress' power to preclude judicial review in deportation cases." Section 440(a) of the AEDPA eliminated the statutory provisions for review of final orders of deportation entered against permanent resident aliens who are deportable because they have been convicted of certain serious criminal offenses. See *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Salazar-Haro* v. *INS*, 95 F.3d 309, 310-311 (3d Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir. 1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, No. 96-6076 (Jan. 6, 1997); see also *Sanchez-Rodriguez* v. *INS*, No. 96-9518 (10th Cir. July 12, 1996) (per curiam order dismissing petition for review for lack of jurisdiction); *Rolle* v. *INS*, No. 96-4560 (11th Cir. July 15, 1996) (same). No court of appeals has accepted petitioner's argument that the Due Process Clause of the Fifth Amendment and the separation of powers doctrine require that every aspect of a final order of deportation be subject to direct judicial review. The only court of appeals that has addressed that argument rejected it. See *Duldulao*, 90 F.3d at

399-400.[4] Moreover, the argument that the Constitution requires the availability of judicial review is especially weak where, as here, the alien has conceded that he is deportable and the only remaining dispute concerns whether he is eligible to be considered for discretionary relief from deportation.

At the same time, neither the Ninth Circuit in *Duldulao* nor any other court of appeals has held that Section 440(a) bars all avenues for judicial review of all issues that may arise in a deportation proceeding. To the contrary, several courts have indicated that Article I, § 9, of the Constitution may in certain limited instances require the availability of habeas corpus. See *Kolster*, 101 F.3d at 790 (Section 440(a)'s elimination of direct judicial review does not offend due process or separation of powers because "any habeas review that is required by the Constitution remains available"); *Salazar-Haro*, 95 F.3d at 311 (due process concerns are satisfied by the availability of constitutionally mandated habeas review); *Hincapie-Nieto*, 92 F.3d at 30-31 (noting that petitioner may seek relief in habeas, but "express[ing] no opinion on the nature of the remedy or the scope of [habeas] review that remains available in any court"); *Duldulao*, 90 F.3d at 400 n.4 ("The availability and scope of collateral habeas review where the 'paramount law of the Constitution' may require judicial intervention was not an issue before us, and we need not decide whether section 440(a) purports to preclude it.") (citation omitted).

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[4] For the reasons set forth at pages 8-14 of our Supplemental Brief in *INS* v. *Elramly*, 117 S. Ct. 31 (1996) (No. 95-939) (a copy of which has been provided to petitioner), we believe that *Duldulao* was correctly decided.

Because the lower courts have not yet ruled on what claims (if any) relating to final orders of deportation must be subject to review on petition for a writ of habeas corpus, that issue does not warrant this Court's review at this time. Even if the availability and breadth of constitutionally required habeas were ripe for review, moreover, this case would be an inappropriate vehicle for decision, because petitioner has not sought a writ of habeas corpus.[5] Cf. *Kolster*,

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[5] We have little doubt that, had petitioner filed a petition for a writ of habeas corpus, it would have been denied, and rightly so. The constitutional writ has historically been available in the deportation context only to redress significant violations of constitutional rights or ultra vires actions exceeding the Attorney General's delegated power or jurisdiction. It does not extend to claims of lesser errors, such as a lack of substantial evidence to support a decision, an abuse of discretion, or (as here) a claim that the Attorney General or her delegate has misinterpreted a non-jurisdictional statutory provision. See, *e.g.*, *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus. But a want of due process is not established by showing merely that the decision is erroneous.") (citations omitted); *United States ex rel. Tisi* v. *Tod*, 264 U.S. 131, 132-134 (1924) ("Tisi's claim to be discharged on habeas corpus rests wholly upon the contention that he has been denied due process of law. * * * [M]ere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law.").

Petitioner does not suggest that the BIA transgressed the Constitution, or that its decision in this case exceeded the Attorney General's delegated power or discretion. Rather, his underlying claim is that the BIA erred when it determined that petitioner was statutorily ineligible for Section 212(c) relief. To the extent that Article I, § 9, of the Constitution vests in the courts an irreducible habeas jurisdiction, that

101 F.3d at 791 ("As the nature and scope of habeas review available to aliens like Kolster is not properly before us at this time, we do not reach those questions."); accord *Duldulao*, 90 F.3d at 400 n.4.

2. In any event, further review in this case is unwarranted because the Attorney General no longer has the authority to provide petitioner the relief from deportation that he requests. Before the enactment of the AEDPA, the final sentence of Section 212(c) stated that discretionary waivers were not available to any "alien who ha[d] been convicted of one or more aggravated felonies and ha[d] served for such felony or felonies a term of imprisonment of at least 5 years." Section 440(d) of the AEDPA amended that sentence to provide that Section 212(c) "shall not apply," *inter alia*, to any "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D)." 110 Stat. 1277. As noted above, petitioner is deportable by reason of having committed criminal offenses covered in Section 241(a)(2)(B)(i) and (C).

The AEDPA does not specify in terms whether Section 440(d) bars the Attorney General from acting on a petition for relief filed by an alien on or before the date of its enactment. Because the actual granting of relief is the action targeted by the amendment of Section 212(c), however, it follows that the amendment eliminated the Attorney General's power to provide relief in pending cases.[6]

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jurisdiction does not extend to run-of-the-mine differences over statutory interpretation.

[6] The BIA held in *In re Soriano*, Interim Dec. No. 3289 (June 27, 1996), that the BIA has authority to provide relief in pending cases. At the request of the INS, the BIA referred its

In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), this Court emphasized the prospective nature of proceedings respecting deportation:

> A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime. The deportation hearing looks prospectively to the [alien's] right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the [alien's] right to remain.

*Id.* at 1038 (citations omitted). As Congress's views respecting "persons whom it does not want" (*Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913)) change over time, deportation laws are modified accordingly. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) ("any policy toward aliens is vitally and intricately interwoven with contemporaneous policies") (emphasis added). The focus of the enterprise is forward-looking—*i.e.*, whether an alien should be permitted "to remain in this country in the future." *Lopez-Mendoza*, 468 U.S. at 1038. As a general matter, therefore, statutes that modify the standards for deportation should presumptively be given present effect.[7]

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decision in *Soriano* to the Attorney General for her review. See 8 C.F.R. 3.1(h). By order dated September 12, 1996, the Attorney General vacated the BIA's opinion in *Soriano*, pending her further determination.

[7] For that reason, petitioner's underlying claim—that only attempt-based firearms convictions entered after the enactment of the Immigration and Nationality Technical Correc-

The AEDPA's constriction of the universe of criminal aliens who are eligible for Section 212(c) relief similarly warrants present application. In exercising the Attorney General's discretion under Section 212(c), the BIA looks prospectively to "whether the granting of section 212(c) relief appears in the best interests of this country." *In re Marin*, 16 I. & N. Dec. 581, 584 (BIA 1978). Accordingly, "[l]ike statutes altering the standards for injunctive relief," changes in the scope of the Attorney General's discretionary authority "ha[ve] only a prospective impact." *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996).

Congress's modification of Section 212(c) is, moreover, analogous to the adoption of a new jurisdictional rule. Just as new "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274, Section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to obtain such relief. The principles underlying the present application of jurisdictional rules to pending cases thus apply equally in this context. See *Scheidemann*, 83 F.3d at 1523 ("Like statutes constricting the jurisdiction of a judicial body," changes to the class of aliens eligible for Section 212(c) relief "speak only to the power of a public agency.").

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tions Act of 1994 are grounds for deportation under Section 241(a)(2)(C) of the INA—is without merit.

Because the Attorney General lacks authority under current law to grant respondent's application for a waiver of deportation under Section 212(c),[8] this case is moot.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] We note that Section 304 of IIRAIRA repeals Section 212(c) in its entirety and replaces it with a new Section 240A, which authorizes a form of discretionary relief termed "cancellation of removal." See IIRAIRA § 304(a)(3) and (b) (*reproduced at* 142 Cong. Rec. H11,800 (daily ed. Sept. 28, 1996)). However, with certain limited exceptions not applicable here, IIRAIRA's provisions respecting cancellation of removal apply only to administrative proceedings initiated after April 1, 1997. See IIRAIRA § 309(a) and (c) (*reproduced at* 142 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)).